

‘What does a social justice lawyer need to know?’

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A few weeks ago I was walking along Eddy Avenue at Sydney’s Central Railway Station. It was my usual early morning route, into the oncoming traffic of pedestrians. Past cafes, backpackers waiting for buses to Byron Bay, and homeless people sleeping in the doorways of closed up stores.

Minutes earlier, as I was leaving the station, I had begun a quick, on-the-run meditation moment. When walking along Eddy Avenue, or anywhere, my mind is usually running ahead, thinking of where I’m going, what I have to do, and what I am not getting done. I see the pedestrians, cafes, backpackers and homeless people, but they are simply my surroundings while I am in my own world of thoughts. It would be much the same, I think, if my mind were full of music coming through my headphones from Spotify.

In this meditative state, however, my mind was not running ahead. To the contrary, it was very present. I saw and sensed the moment and the place with immediate clarity; I was confronted by the real presence, in my orbit, of people living on the streets.

It was a moment of really seeing those whom I am committed to help, whose situations I describe in indignant rhetoric, in law reform submissions, and in research data and reports. I felt both embarrassed and enlivened, chastised and affirmed. I was reminded of what I can too easily forget: that it is the lives of real people, their struggle for survival, that I work for.

Many of you know from your own experience that this reflective awareness of very proximate human need is only one of many insights that can enhance social justice lawyering.

Today I share with you some thoughts about knowledge and abilities that could – perhaps should – inform the practice of a social justice lawyer.

These thoughts come from a number of sources, most obviously from my own lawyering, but more recently from my research into alternative law degree curriculums

and my teaching of law as a tool for social change, and from my working with law students on social justice projects.

The more involved the students and I become in those projects, the more it is apparent that very little in students' law studies prepares them to use their legal knowledge to pursue justice outside the confines of conventional private practice. This is so despite the fact that only a minority of law graduates go into conventional private practice, but that is a paper for another day (for a legal education conference this weekend, in fact, when I will politely tell the private profession and judges that theirs is far from the only working life for which a law degree can and should prepare students).

What, I asked myself, *could* we be teaching that would better prepare students to use their law degrees to pursue justice?

A few preliminary points.

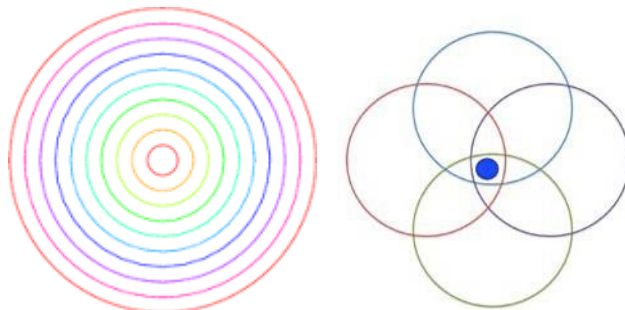
First, I am saying 'social justice' lawyer, but I am not focused at all on the precise meaning of the term. For today's purposes it is just one way of referring to a lawyer who works to address social phenomena such as inequality, disadvantage, discrimination, marginalisation, oppression and abuse.

Secondly, the work of such a lawyer may be focussed on meeting the immediate needs of a client, or on changing the structural causes of those needs, or both. Some of what I say here will be common to practising for both client needs and structural change, and some will be more relevant to one than the other.

Thirdly, you may know all of what I am saying, or some of it may be new to you. But either way, I am not sure we are explicit about the particular qualities that social justice lawyering demands, and that social justice lawyers demonstrate, and so I offer this for discussion, comment, criticism, reflection and refinement. For those who know it and do it already, I hope this is step towards recording it and making it explicit; and for those for whom any part of this is new and of interest, I hope this contributes to your own development.

Finally, I had to decide if I would speak in the first, second or third person. Is the social justice legal practice I talk about something that I do, you do, they do, or we do? Are the skills and knowledge I talk about needed by me, you, them or us? I've opted for 'we'. We make many different but related contributions; we're all in this together.

You can think of what I am setting out as concentric circles, moving out from a clearly defined and familiar core, to increasingly less familiar outer bounds of legal practice. Alternatively, it is a Venn diagram, and I am describing the many areas of skills and knowledge that come together in social justice lawyering.



mathworld.wolfram.com/ConcentricCircles.html

Legal knowledge

The obvious place to start is that a lawyer needs to know the law. And the obvious idea we have of the law is doctrinal; the statutory provisions and common law rules of everything from the *Constitution* to the *Fences Act*.

Of course it is unremarkable that able and effective lawyering of any sort requires a very sound grasp of legal principles, complemented by skills in research, reasoning and interpretation to find and understand the relevant statutory provisions and legal procedure, and refined by experience. But for as long as we social justice lawyers are playing and trying to win within the rules of the game, we simply must know and play those rules as well or better than our opponents.

Students ask me what law subjects they should choose for a career in social justice lawyering, and some are surprised when I suggest Administrative Law and Advanced Administrative Law, Civil Procedure, Tax, Corporations, and Trusts. This is the law that underpins the social injustices we fight, and that can be used to achieve the social justice we seek.

The oppressive and threatening use and effect of law is well met and often defeated by the knowledgeable deployment of law and procedural tactics. Many of you can tell tales of technical knockout victories in tenancy and credit matters for example, with the added satisfaction of knowing that your better resourced and better paid opponents underestimated how good a lawyer you are.

Parliament

Speaking of statutory provisions, it is often the words of a statute that are the focus of our reform campaigns. What we need to know, really well, is *how* the words of a statute come to be. Oddly, a standard law degree teaches us about law, but not about how laws are made. Making and changing laws is an exercise in parliamentary process, and in party politics, policies and platforms. We get nowhere saying what we think the law *ought* to be if we cannot at the same time engage in at least the formal processes by which a law *comes* to be.

The breadth of 'law'

So, as well as our technical prowess working with law we need technical knowledge about the *making* of law. We are inclined, however, to think of law principally in terms of statutory provisions, delegated legislation, and common law rules. When working in areas such as tenancy, debt, credit, discrimination, welfare rights, crime and family, the law that we work with is most easily envisaged as the relevant Act and related rules and principles. But, on reflection, we know too that the 'law' that determines our clients' lives comes from places other than the statute books and courts.

The law that matters most in our clients' lives is in the policies and guidelines of agencies and entities, in the discretions exercised by government officers, in the unwritten customs, practices and prejudices of people who exercise power over others' lives; lawyers and bankers, police and debt collectors, landlords and creditors, fellow workers and community elders, family members and gang members. To understand what 'law' *is* in the lives of our clients, and to know what the law is that we say needs to be made or to change, we have to be aware of the extensive and subtle forms that law takes.

Realising that people's experience of the law can be very different from what the law is, or is thought by its makers to be, we see that a particular reform goal is achievable through the way the law *operates*, and how people interact with it, whatever its actual terms.

Legal pluralism

Now we have technical prowess working *with* law, technical knowledge about the *making* of law, and a contextual understanding of *forms* that law can take. This last point

can be taken further, beyond forms that *our* law can take, to, quite simply, other forms of law.

Legal pluralism – more than one legal system operating in the same social setting – is an uncomfortable fact for the state, and for those who, as a way of saying that there is only one law, insist that we are all subject to the same law. We *are* all formally subject to the same law and, as well, some are subject to other laws. Many people in Australia – among us and among our clients – are beholden to laws that do not emanate from the state but are integral to cultural identity, in areas of life such as kinship, inheritance, debt, marriage and divorce. Again, to understand what ‘law’ is in the lives of our clients, we have to keep in mind the legal pluralism that is a feature of their lives.

One night, at an evening advice session, I was asked by a woman for advice about her entitlements under a will. Her mother’s will had been written for her by an Imam according to Sharia. Each of the two sons received 40% of the estate and the daughter received 20%, in accordance with a rule in Sharia that a son inherits twice the share of a daughter. My client was aware that Sharia imposes on a son serious duties of trust to ensure that his sister is provided for, but she was not willing to accept this dependence. Her only option was to apply for a family provision order from the Supreme Court.

The NSW family provision law, to its credit, allows a court to have regard to ‘Aboriginal or Torres Strait Islander customary law’, but not, explicitly, to any other law. This was a reminder to me of legal system’s struggle to recognise the concurrent systems of law that are the reality of people’s lives.

Positivism

From legal pluralism I move to legal theory.

We tend to be positivists, to see law as what can in fact be seen; the words on the page, the authoritative norms of the state. Consistently with a positivist conception, we respect and comply with law while at the same time having passionate debates about whether it is right, or not.

Rarely in our law reform campaigning or advising clients do we reject the validity of a law because it lacks moral authority. Rather, we rely on moral arguments to persuade the state to change the law, and to sympathise with our clients for the hardship caused by such a law. If we were to reject the moral authority of a law, and engage in, say, a

campaign of civil disobedience, then we would have switched sides, and be aligned with the natural law tradition of Aquinas and Fuller, against the positivism of Austin and Hart. Environmental and asylum seeker protests come to mind.

A working familiarity with legal philosophical perspectives on law can help us see more clearly the choices we have and the choices we make both in our law reform work, and in our advice to clients.

Theory

From positivism we can move to theory more generally.

Political theory, for example, can help explain how and why laws emerge and are used; identifying consensus and conflict models of legislation, and revealing instrumental, symbolic and ideological reasons for a state's passing a law.

Critical theory helps us see the oppressive quality of law and the legal system, and its occasional liberating capacity, with greater clarity and insight. Marxism, feminism, critical race theory and critical disability theory, for example, are all ways of understanding how law is a vehicle for power; critical perspectives give us a structure and language for understanding how our clients see and experience law.

Values

Theory invites us to make and declare choices, about ways of looking at law that we accept or reject; about ways of looking at law that we think have validity or are flawed, that we think accurately portray law in society, or not. This takes us to the question of values: what do we believe?

To put the options in simplistic binary terms, at a general level, a choice of values might be conservative or progressive, but more particularly the choice could be between positivism and natural law, rule-based law or principles, individual liberties or state intervention, and so on.

Consciousness of how we see law in society helps us decide what directions we might take in our advice and advocacy, helps us recognise why others take different positions from ours, and helps us negotiate those differences.

Human rights

A prominent progressive value in social justice lawyering is a commitment to human rights. But we could perhaps know and understand more about human rights than we do; what they stand for, what they are based on, how they reconcile when they conflict, how they align with other values such as community or deistic faith, when they are useful tools for advocacy and when they might not be, and so on.

We are often confronted by – and may ourselves be guilty of – rhetorical claims for a right, when there is little theoretical basis for the claim and we have nothing to fall back on when the claim is contested.

Reflection

Understanding our own values is not always easy, often because our working lives tend to not give us the opportunity to think about it. Few disciplines instil as strong a sense of professional identity as law does. There is little or no reflection in our training or in our practice; to the contrary, we are taught to be lawyerly in an uncritical and accepting way; officers of the court, upholders of the rule of law, neutral servants of law, and committed but impartial advocates for our clients. And if it is not the instilled and reinforced culture of legal practice then it is some or any of workplace culture, deadlines and workload, that can limit our capacity to stop and reflect on our work, and to think deeply about what we actually believe in.

Reflective practice is a conscious activity that allows us to engage, and stay engaged, with the realities of social justice lawyering. It is a habitually reflexive way of thinking, that enables us to be aware of ourselves – our own resources, our health, our spirit, our values – and of the forces that lead us to change, adapt and recalibrate. My moment of clarity on Eddy Avenue is an example.

Engagement

An insight that from our reflective practice might be how deeply we remain conventional lawyers while practising as social justice lawyers, and an implication of *this* might be that we are more removed than we ought be from our clients' experience, even when it is our knowledge of that experience on which we base our expertise when advocating for reform.

It would be possible to be a dedicated and perhaps quite effective social justice lawyer without ever leaving the office, except to go to meetings or court. At our community legal

centres we open our doors at night and we run outreach centres, but our clients usually come to us, usually on our terms. We rarely walk with our clients, let alone in their shoes.

The representation of our clients lives can never be wholly authentic in our hands, but we might think, on reflection, that there are ways we could better understand the worlds our clients are in.

Ethical models

The only time I know a community legal centre client made an ethical complaint about me, I had a call from the Law Society. The Law Society officer identified the client, a man with an intellectual disability, and said to me 'it's all right, we know what he's like; we won't take it any further'. I was in the odd position of defending my client's autonomy by urging the Law Society to investigate me for an ethical breach.

The principal ethical model for lawyering – for some, the only ethical model – derives from our ingrained role as officers of the court and impartial advocates. The impartial advocate is the standard, inculcated conception of a lawyer, and the professional practice rules to which we are accountable are premised on our acting that part.

The rules make no explicit allowance for a lawyer's moral agency. From the barrister's cab rank rule to the lawyer's duty to act on instructions, we are formally denied the option of moral choice. But of course we make moral choices all the time; they inform our work and the choices about what work we do. We are social justice lawyers in spite, at times, of our mandated framework of professional ethics, and when we are lawyers not for a client but a cause, we risk crossing ethically approved bounds of conduct.

It is when we understand our ethical duties, and our own values, and our own conceptions of law, that we can better negotiate the challenges to social justice lawyering posed by, for example, ethical rules of confidentiality and conflict of interest.

How, for example, do we justify inflexibly turning away a related party in a dispute because of a possible conflict of interest, leaving them unadvised? Alternatively, how do we justify advising a related party in a dispute despite a possible conflict of interest, so that they are not left unadvised?

How do we justify putting our clients at risk by using de-identified case studies in our advocacy and education? Alternatively, how do we justify not converting our clients

repeated experiences of injustice into campaigns for change?

The explanations, if not definitive answers, lie in our ethical duties, our own values, and our own conceptions of law.

Interdisciplinarity

Lawyers' strong professional identity leads to a notorious characteristic that can limit our work as social justice lawyers: lawyers work best, and often only, with other lawyers; even in CLCs our interdisciplinary work can be limited, or not optimal.

Lawyers tend to see things only or mainly through the lens of law. We quickly and readily characterise an issue as one that is amenable to a legal response, bringing to mind Maslow's observation that, 'it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail'. A lawyer's professional instinct is often to give a problem a good whack with a legal hammer, even though the problem might need a more different or more nuanced solution.

For example, we know that an eviction is often, if not usually, about much more than the eviction notice, and could be a consequence of any of, say, addiction, abuse, or poor health. And we know that a criminal charge could be a consequence of any of, say, addiction, poverty, depression, and so on. But even if we recognise this, we face another limitation on our interdisciplinary work: we are not especially knowledgeable about the ways in which complementary professions work, their skills and practices, their boundaries and constraints, and their ethical rules especially around confidentiality.

Similarly in law reform. Effective law reform – especially across the broad conception of law I described earlier – invites participation by a wide range of people: researchers, social scientists, psychologists, anthropologists, statisticians, philosophers, activists, journalists, bloggers, lobbyists, consultants, designers, campaigners, film makers, and experts in their field.

In fact, we might ask what *is* a lawyer's necessary role in law reform? We have expertise in drafting, and experience of the ways law works and doesn't work; the adversarial paradigm equips us with strong analytical and persuasive skills, rational dexterity, the ability to identify issues and unravel complexity. There is little else in our formal education or necessary professional skills that positions us for a broad, social, pluralist, consultative, activist, campaigning, strategic approach to law reform.

Perhaps a social justice lawyer is just a smart activist with some useful skills.

Humility

This invites us to reflect on our professional role and how we relates to other professions. Lawyers' strong professional identity is often seen as arrogance. We have an ability and willingness to trump other perspectives with a combination of rationality, over-riding ethical duties, and sheer confidence. Many other professionals do as our clients do, and presumptively defer to us even before we've opened our mouths. The effect is to shut off the possibility of shared knowledge and expertise.

Lawyers might counter this through professional modesty, if not humility: a conscious stepping back; not seeing only a *legal* problem, and engaging in a thoughtful appreciation of *other* professional perspectives that might meet a client's needs and achieve law reform goals.

Listening

To this end, social justice lawyering could nurture a skill that is not always a lawyer's strength: listening. We need to make sure we are listening if we are to hear other's perspectives. We need to make sure we are listening if we are to comprehend our client's experiences. And there are times we need to make sure we are listening because that is all that is required.

Lawyers tend to be problem solvers; we seek and deliver solutions, hitting the nail with our hammer. Not only are we not necessarily always the right people to propose a solution or, at least, not alone, but sometimes the solution we have in mind is not the point. Some clients, some client groups, some issues, want only to be heard.

Skills

The topic of listening takes us to the area of skills. There are many interesting and challenging skills that social justice lawyers may need to use, more often and more integral to their work than for a conventional lawyer, such as the ability to *design* strategies and tactics for achieving social change, to *collaborate* with colleagues and a wide range of other professionals, to *facilitate* meetings, to write *media releases* and manage *social media*, to conduct live and pre-recorded *interviews*, to collect and analyse *data*, to work with *interpreters*, to work to a *board* within a corporate structure, and to

design and deliver *education and training*. In the conventional conception of lawyering few of these skills would arise often if at all, and some would be anathema, but we recognise them as part of being an effective social justice lawyer.

Conclusion

Most of what I've touched on is the subject of books, articles and reports. A dream I have is to bring it all together into something structured, thoughtful and useful, perhaps in an institution called The Other Law School, where the teachers include lawyers, political scientists, social workers and sociologists, and the prescribed text is the *Alternative Law Journal*.

Until then, I hope that is enough to go on with, to reflect on, when there is time, back at the coal face of social justice lawyering.